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Supreme Court of the United States

OCTOBER TERM, 1917

R. A. FLANDERS,
as trustee in Bankruptcy of
M. C. Coleman, Bankrupt,
Appellant,

vs.

ELISHA JORDAN COLEMAN,
Appelle.

No. 984

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

BRIEF OF THE APPELLEE

I.

Question for Review

The question presented in this case to the court, is: Whether or not the court below erred in holding that it was without jurisdiction to pass upon the question presented?

II.

Statement of Sections of the Bankrupt Law of 1898 Involved, and Decisions Thereon

Prior to the amendment of 1903 and 1910 the law governing suits brought by a trustee in bankruptcy was in these words:

> "Suits by trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have

brought or prosecuted them, if the proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Section 23, Bankrupt Act, 1898.

Bards vs. Hawarden Bank, 178 U. S. 524, this court says:

> "The Dictrict Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the proceedings in bankruptcy."

Since the **Bards vs. Hawarden Bank** case has been decided Section 23 of the Bankrupt Law has been amended, and there is added the following:

> "Except suits be brought for recovery of property under sections 60, subdivision b, 67(e) and 70(e)."

So we examine those sections to see what they are:

Section 67(e) makes provision for the seeting aside of fraudulent conveyances and the recovery of property so conveyed, in the suit of a trustee.

Section 60(b) makes provision for the recovery of a preference given by the bankrupt within four months before the filing of petition in bankruptcy, or after the filing of said petition in bankruptcy and before the adjudication of the bankrupt. And the same covers judgment.

Section 70(e) is in these words:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover, the property so transferred, or its value, form the person to whom it was transeferred, unless he was a bona fide holder for value prior to the date of the adjuridation. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and

any State Court which would have jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

We wish to call attention to this fact, which is undisputed: The appellee does not claim title or ownership to said property by any transfer, conveyance or judgment from the bankrupt, either directly or indirectly, but claims title, right, interest and ownership in said property in fee simple by virtue of a deed to him years before the bankruptcy proceeding, and duty recorded. He says:

"If my son ever had title to said property he has it now."

He claims and contends that his son never had title or ownership to said property, but that he held the same for the appellee and with his consent, recognizing his title and ownership at all time, and claiming no title or ownership in said property at any time. Hence, the question in this case was title or no title, it being admitted by the appellant that the paper title was and always has been in the appellee. The appellant contends, however, that the title vested in the son by operation of the statute of this state, which will be hereinafter discussed.

"The law of bankruptcy is purely statutory, both in origin and development. The study of banruptcy then, is a matter of statutory construction."

Preface, Collier on Bankruptcy, page XXI. September 10, 1898.

Therefore, the appellee contends, and the court so held, that no question of title or ownership between the trustee in bankruptcy and an adverse claimant could be decided in the United States Court except the question falls within a legal construction of the three sections of the Bankrupt Act above cited, and, as the appellee does not claim title or ownership by any act of the bankrupt, but claims from an entirely different source, that the merits of the case could not be decided by the United States District Court, and could only be decided in a State Court, and when that qeustion appeared the court

was without jurisdiction, and it made no difference how the facts looked to the court, the court was confined to those cases specifically falling within the above sections of the Bankruptcy Act, and it was in those cases alone the amendments by Congress of 1903 and 1910 gave the United States Court concurrent jurisdiction with the State Courts.

> "It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits of the case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision."
>
> **Bards vs. Hawarden Bank, 178 U. S. 537.**

We quote from **Harris, Trustee, vs. First Nat. Bank of Mt. Pleasant, 216 U. S. 383, 54 Law Ed. 528.**, as follows:

> "A suit by the trustee in bankruptcy to recover property held by a third person, which, if the allegations of the petition are true, belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate, is not made justiciable in the bankruptcy court by the provisions of the bankrupt act of July 1, 1898, (30 Stat. at L. 544, Chap. 541, U. S. Comp. Stat. 1901, page 3418), Sec. 70e, as amended by the act of February 5, 1903, (32 Stat. at L. 797, Chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1308), conferring concurrent jurisdiction on courts of bankruptcy of suits by trustees to avoid any transfer of the bankrupt's property which his creditors might have avoided, and to recover such property, or its value, form persons who are not bona fide holders for value."

And in concluding this opinion the court uses this language:

> "That subdivision provides for avoiding transfers of the bankrupt's property, which his creditors might have avoided, and for recovery of such property, or its value, from persons who are not bona fide holders for

value. In this action, no such transfer is alleged; no attack is made upon a transfer by the bankrupt which would have been void as to creditors. The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recover sought is of property held for the bankrupt estate, which the defendant wrongfully refused to surrender. The District Court was right in denying jurisdiction of the suit, and its judgment is affirmed."

So, in the present case, the appellee is in possession, refusing to surrender, and says that the title and ownership of this property is in him, that it always has been since the date of his purchase, years ago, and that title and ownership has never been in the bankrupt. If the title to this property is in the bankrupt and thereby passed to the trustee, and the appellee is wrongfully holding said property from the trustee, not claiming by or through the bankrupt in any way, then, according to the above decision United States Court is without jurisdiction, and this was so held by the District Court of the United States.

III.

Statement of the Case

We quote from the summary of the Honorable B. D. Evans, Judge of the District Court, whose decision is alleged as error. On page 53 of the printed record the Judge says:

"This is a suit in equity by the bankrupt's trustee against an adverse claimant to recover a tract of land, and certain notes given by the tenant for the rent of it. The jurisdiction of the court is invoked under sections 60b, 67e and 70e of the bankruptcy act as amended. The general scope of the bill is to the effect that many years prior to the bankruptcy, the father of the bankrupt, who is the defendant, made a parol gift of the land to the bankrupt, who entered into possession of the land, made valuable and permanent improvements thereon on the faith of the gift, and that under the laws of Georgia, the bankrupt became vested with a complete title thereto. About a year prior to the bank-

ruptcy the bankrupt mad a parol lease of the premises for five years, taking five notes payable to himself or bearer maturing annually for the rent of the land. Within four months of the filing of the petition to be adjudicated a bankrupt, the bankrupt, while insolvent, surrendered possession of and control over the land, and delivered four of the rent notes to the defendant (the other having been previously hypothecated to a bank) with intent, as alleged, to hinder, delay and defraud his creditors. The defendant denied that he made any gift of the land as alleged to his son, the bankrupt, and averred that the land belonged to him and never belonged to his son, and that his son's possession was permissive and by virtue of his consent that he mig'ht have the use of the land, and that the son's possession was his possession, and that the rent notes, although taken in the name of the son or bearer, were his notes. The defendant also pleaded to the jurisdiction of the court."

Page 54, printed record:

> "The trustee submitted evidence tending to show circumstances from which a parol gift of the land might be inferred, while that of the defendant was to the point that he had permitted the bankrupt to use the land, and that no gift of it had been made. The evidence further disclosed that the bankrupt made a parol lease of the land for five years, taking five notes, payable to himself or bearer, and that within four months before the filing of the petition he delivered four of the notes to the defendant having previously used one of them. The bankrupt and the defendant denied that parol gift of the land had been made, and insisted that the bankrupt's possession was by permission, and with the consent of the defendant."

Evidence of M. C. Coleman, sworn for the appellant as a witness, on page 33 of the printed record is as follows:

> "He did not at any time give me this piece of land. I did not at any time make any valuable improvements on it under the idea that he had given it to me. I have always acknowledged his right of property."

On page 34:

> "My father had the right and dominion over this piece of property now in dispute all the time since I have been there. I recognized my father's title, ownership and right to control this property as his own, all the time while I was there. From the time that I went there until the time I turned it over to him. Any time that he would have told me that he wanted it I would have given it up, because I knew it was his. It wasn't mine."

E. J. Coleman, appellee, sworn, says on page 39 of the printed brief:

> "This piece of land in dispute was never given to my son. He had the use of it. . . . As far as I know, all during his possession over there he had recognized my ownership, and title and dominion over that land always. I never saw an act from the boy in my life exercising any privileges like it was his'n. Never have seen any sign of it in my life—no talk, no acts that Iever heard him doing."

The petition bases titlte and ownership of the bankrupt by the possession from his father for more than seven years, presuming a gift, and also a gift with valuable improvements. The latter contention of gift with valuable improvement is not insisted upon, nor can it be, because of the following decisions of the Supreme Court of the State of Georgia: **Harvey vs. West, 87 Ga. Report, 533.** The court holding in this case, that though there was a parol gift with improvements by the son, that the property was not subject to an execution against the son, when the father filed a claim to the property. That there should be specific performance to make the title good.

The presumption of the appellant is based upon the presumption which arises where property is held by the son for seven years without the payment of rent. The answer denies these allegations, and sets up acts of dominion by the father, acknowledged by the son, and disclaimer of title by the son.

In reference to the notes on page 40 of the printed record, E. J. Coleman testifies as follows:

"When I got them (referring to the notes) I considered them mine, because they was given for stuff that belonged to me."

IV.

Argument

The trustee nowhere contended that there had been a transfer or conveyance of this land by the bankrupt to his father, but endeavored to show that the property in dispute was the bankrupt's property by virtue of a statute of the State of Georgia which presumes gift after years possession by a child from a parent. They undertake, in order to obtain jurisdiction in the District Court, to force the appellee to claim title to this property through the bankrupt, which he declines most positively to do, and, even, for the sake of argument, if the bankrupt had made a transfer voidable under the bankrupt law, and the defendant disclaimed all title under said transfer, being in possession before the bankruptcy, and set up title from an entirely different source, and said that title was never in the son, and therfore he could not convey or transfer the same, then the District Court would be without jurisdiction, and could not settle the matter as to the title contended for by the appellant, for the appellee held said land from an entirely different source independently of the bankrupt and held it for a long number of years before the bankruptcy. When that appears in this case the jurisdiction of the District Court of the United States vanishes.

We know of no law of the United States Court or of the Courts of Georgia which forces a party to claim titlte or ownership of property through any channel, but he sets up title and ownership in that way that he claims, as was done in this case, and this court, it seems to us, would not allow mere allegations of a transfer, conveyances, etc., made and contended for by the appellant to force the appellee to answer in that court when his right, title ownership and claim to such property does not come through the bankrupt in any way either directly or indirectly.

The section of the Code of Georgia relied upon by both the appellant and the appellee is section 4151, the first part of said section being relied upon by the appellant, and the last part being relied upon by the appellee:

Part relied on by appellant:

> "The exclusive possession by a child of lands belonging originally to the father, without the payment of rent, for the space of seven years, shall create conclusive presumption of a gift, and convey title to the child,"

Part relied on by the appellee:

> "unless there is evidence of a loan, or of a claim of dominion by the father acknowledged by the child, or of a disclaimer of title on the part of the child."

And the remainder or the latter portion of the section is the defense made by the appellee, and he claims title and ownership by written deed properly recorded, to the property in dispute which is admitted as the claim and contention of the appellee by the appellant.

> "Where the only defence, as shown by the evidence, to an action for land under claim of a parol gift by a father to his child, was that the child went into possession under agreement that the land was loaned to him, it was error to charge the jury that they could not find for the father unless they believed from the evidence that the child not only took possession as of a loan, but also acknowledged a claim of dominion by the father, or disclaimed title."
>
> **Hardman vs. Nowell, 84th Ga. Report, 46.**

In discussing this case, on page 48, the Justice uses this language:

> "The father can insist on either or all of these defenses."

Just here, if the court will pardon a little diversion, we wish to say that an examination of all the Georgia authorities cited by the appellant will show that the cases were decided upon the issue of fact, the jury finding in some of the cases

that the seven years possession had been rebutted, and in others that it has not been rebutted, and we think the very citation of these Georgia authorities was for the purpose of convincing the court that this seven years possession made a title, and that evidence of the appellee, contending that his son held same by permission and loan, cearly demonstrates the fact that the District Court is without jurisdiction to try the issues of the case. There is no law, and no way to construe the bankrupt law so as to give to the court the right to pass upon any questions between an adverse claimant as to his title and ownership of property when it appears his title or ownership does not come through the bankrupt. It shows it to be not only adverse to the trustee, but adverse to the bankrupt, and title and ownership coming through an entirely different source than any act of the bankrupt, or conveyance or transfer from him.

For the sake of argument, just here, suppose the bankrupt thought that it was necessary in order to make or carry out the agreement between his father and himself, towit: That he was permitted to go into possession of this property and use it as a loan pay no rent therefor, and when he wanted to return it to the father, it was necessary for him to make a transfer or conveyance thereof, back to his father, and that he did so, (which he did not in this case) and then the father, the appellee, should say that he claimed no title, right or interest in this property under and by virtue of this conveyance or transfer, for the reason that the bankrupt never had any title to convey, he never having owned this property, that it was the property of the father at all time by virtue of his purchase and written deed duly recorded years before bankruptcy intervened, could it be said that under the construction of the bankrupt law, meaning sections 60b-67e-70e, of Sec. 23, that the District Court would possess jurisdiction to try independently the adverse title set up by the father as against the son?

We next come to the question where the appellant contends this possession of this land was given to the appellee

within four months. It can not be doubted that if this land was owned by the appellee and never owned by the bankrupt, he would have a right to take possession of this property at any time, it being his own property.

> "Whatever may be the true view of the law where a debtor conveys his own property to a creditor, we are satisfied that where one conveys property not his own, which he wrongfully holds, to the rightful owner, the law does not require the latter to yield his rights and decline taking it because the person who has withheld it wrongfully, may, in returning it, intend thereby to keep his own creditors from getting it. One who takes merely what is his own is not punished for considerations which may operate upon the mind of the party who gives it up."
>
> **Dodd & Co. vs. Bond, 88 Ga. Report, 360.**

Two things are necessary to create jurisdiction, whether original or appellate in the inferior courts of the United States.

> The Constitution must have given to the Courts the capacity to take, and the Act of Congress to Supply.
>
> **Nashville vs. Cooper, 6th Wallace, 347.**
>
> **United States vs. Hudson, 7th Cranch 32.**
>
> **Bank of United States vs. Deveaus, 5th Cranch 61.**
>
> **Kentucky vs. Powers, 201 U. S. 1.**

So, upon an examination of the question of jurisdiction, we find the juridiction of the district court is limited to transfers, conveyances, etc., and does not extend to the settlement of title to property between trustees and adverse claimants, when the title is not derived from the bankrupt directly or indirectly, and the adverse claimant does not claim title or possession through any act of the bankrupt directly or indirectly, legal or illegal.

Just here we take the opportunity to call attention to a part of the brief of the appellant which discusses the different trusts that may be set up in the State of eGorgia, and he says

that there are, many constructions of the law that would defeat jurisdiction in this court, and open the door to fraud, and force the trustee to litigate in the county or residence of the party setting up these trusts. We certainly do not think it necessary to discuss that proposition, because the District Court could not, and this Court of review, will not, deal with the imperfections, if there are any, with the jury system in Georgia, and of the trust allowed under its statutes to be set up. In any case, even if this court thought this law was wrong, the court would not take jurisdiction of one of these matters simply to slap the State of Georgia in the face, because her law is not in accord with the view of this court, and her statutes might open the door to fraud, and we know of no such jurisdictional ground as that in the bankrupt law or any statute of the United States in setting out the jurisdiction of its courts, and we do know that a party bringing suit in the United States court is compelled to set out the jurisdictional facts. And if this argument of the appellant could be considered at all, and this court could hold jurisdiction because of these laws of the State of Georgia, then the decisions of this court would make a good ground of jurisdiction in the United States Court, which are the allegations against the system of trusts and statutes, and trial by jury in Georgia.

Lowell vs. Newman, 227 U. S. 412, 57th Law Ed. 577.

In discussing sections 60b, 67e, 70e, the Supreme Court in the above decisions uses this language:

> "Trustees must bring cases clearly within the terms of these sections to sustain jurisdiction of the court, the mere fact that the trustee claims title to the property was in the bankrupt before bankruptcy does not give the court jurisdiction."

Bailey vs. Baker Ice Mfg. Co., 239 U. S. 274.

In discussing the effect of preference this court uses this language:

> "That the transfer referred to in this section is where the bankrupt surrendred his property for the benefit of a particular creditor."

Remember, that in this case there was no secret equity or trust set up. The appellant does not contend that the appellee is claiming this property by any secret trust, equity or right, that has been withheld and is now for the first time presented in order to hinder, delay or defraud creditors, and all the cases cited upon that subject in the brief of the appellant are where there was some secret right or equity concealed and unknown to creditors, which a party, was trying to assert to the detriment of creditors and to hinder, delay and defraud them in the collection of their debts. Still, the appellant cites on page 35 of his brief a section of the Code of the State of Georgia, and decisions therein where secret trust arises. A careful reading of these decisions will show that sometime the courts held in fevor secret trusts and will enforce them, and sometime they were of such a character that they will not uphold the trust, and, therefore, they make a question of right of creditor, and title to the property. But in this case, as above stated, no secret equity is set up, no purchase of property with money of the appellee, E. J. Coleman, and titlte taken in the name of M. C. Coleman, nor is there any claim of reservation of interest in the bankrupt at the time of the bankrutcy or after the bankrutcy, or before, but the claim in this case, as set out by the appellant, and which he offers proof to establish is that title and ownership of this property was at one time openly and notoriously, on account of the law of Georgia, in E. J. Coleman, the appellant, the whole world know of the fact that title was in him, and if title had not been in him, then he could not have given this property to his son, as contended by the appellant, nor could he have loaned it as contended by the appellee.

Permissive possession can never ripen into title so long as the possessor under permission does not set up an adverse claim with knowledge to the party from whom his permissive possession was acquired. Possession in Georgia is not evidence of title, but is simply notice to bona fide purchaser or the maker of a contract lien from another of all the right, title or interest that may be in the party in possession. To illustrate:

If I should be in possession of a piece of land and Mr. Saussey should sell the land to a member of this court, my possession would be notice to the member of this court of whatever right or title I might have in the land.

Garbutt & Donovan vs. Mayo, 128 Ga. Report, 269.

So, as title passes by writing, duly recorded, is notice to the world of the ownership of the property in the party holding the written title, so a creditor or a bona fide purchaser from M. C. Coleman, the bankrupt, having paid the full purchase price and went into possession could subject this property to their lien, or hold it in case of a purchaser against E. J. Coleman who held the title and thereby had the ownership of the property, said creditors and said purchaser being put on notice by virtue of the law of Georgia relative to deeds. So, how can a creditor say he has been mislead or deceived because a man in possession represented to him that the title to the property was in him? It would be his duty to see if this was true by an examination of the record of the county in which the land lay, and if he relied on the statement of the party it could not effect any party holding the property who was not present and did not in any way mislead by his actions the creditor or purchaser.

So inthis case, if the trustee claims title to this property and says that the creditors whom he represents should subject this property because the son held it for more than seven years without the payment of rent, then, as was found, admit that they knew that in a case of this kind this presumption could be overcome by showing that the father had loaned the son the property in which he found him in possession, and then would be put on notice to make such inquiry of the father as would satisfy him that the son's statement was true. He could not pretend knowledge of one portion of Section 4151 of the Code, hereinabove set out, when it was to his benefit to do so, and deny knowledge of the latter portion of the section, which, if true would defeat the presumption raised in the first part of the section. If he insists on the one he must insist on the

other, and if a man deals with a child in possession of property, he must deal with all the knowledge of the law on the statute books.

John E. Comron vs. Cauchois, 39th A. Bank, Rep. 730.

The trustee contended that the bankrupt had made a deed to his wife (in the above stated case) to hinder, delay and defraud his creditors, and that therefore, when the evidence showed the conveyance was made within four months before the bankruptcy, and the court allowed in evidence a letter written by the bankrupt to a friend for the purpose of borrowing money, in which letter he stated that the property in dispute was his, and that at that time there was a deed on record conveying this property to him and the wife's interest was discussed, the District Court held that the evidence was not sufficient to show a deed made to hinder, delay or defraud creditors, the court found in favor of the trustee because of the statement in the letter that the deed or property belonged to him. The Circuit Court of Appeal, commenting on that case, reversed the District Court on the last proposition, and used this language:

> "But the District Judge held that because Mrs. Cauchois put the title in her husband's name and he was shown to have included the premises in a list of his assets in a letter dated Jan. 31, 1911, to a friend from whom he got a loan, she was estopped from claiming the premises to be hers as against his creditors. But he found Cauchois to be trustee for his wife, in which finding we concur. No representation by him as to his ownership could prejudice her title if she were not a part to it."

In the case the written title was in the bankrupt, recorded, examined by creditors, and therefore binding, but in this case title was not in the bankrupt at any time, being at all time in E. J. Coleman, appellee, admitted to be so by the appellant, and therefore, how could a statement of the bankrupt effect this title of the appellee?

7th Corpus Juris, Section 266b.

"In order to establish a voidable preference it is necessary that the debtor shall have transferred to a creditor some portion of **his own property,** which his other creditors had a right to subject to the payment of their claims."

"The taking of a claimants own property in possession of the bankrupt at the date of his adjudication does not constitute a preference."

Wright vs. Dana Hardware Co., 205, Fed. 355.

The same doctrine in the above citations has been declared to be the true rule by this court. See,

Newport National Bank vs. Nat. Herkimar Co. Bank, 255 U. S. 178-184.

Now we next discuss the notes in this case, and lay down the proposition that the rent for all real estate goes to the party who ownes the real estate, and that the party who does not own it can not receive any benefit or rent therefrom, and we ask the question, what kind of an estate would the bankrupt acquire in this property if the contentions of the appellee, his father is correct, that he made a loan of this land to his son? What is a loa?

"Loans are of two kinds—for sonsumption or for use."

Code of Georgia, Section 3516.

Necessarily a loan of real estate is for use.

"A loan for use is the gratuitous grant of an article to another for use, to be returned in specie, and may be either for a certain time or indefinitely, and at the will of the grantor."

Code of Georgia, Section 3517.

"The borrower acquires no title in the thing loaned, but only the right to possess and use it."

Code of Georgia, Section 3520.

"A lender may not revoke a loan for a definite time so long as the borrower meets fully his engagements. A loan at will, or indefinitely, may be revoked at any time."

Code of Georgia, Section 3522.

So a loan at will or indefinitely may be revoked at any time. So real estate held by loan creates a tenancy at will. Bear in mind there was no writing relative to this real estate, but that everything existing between the bankrupt and his father was in parol, then it is necessary to examine the statute of fraud and find that no estate in realty can be created for a greater period than twelve months.

> "Any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof, must be in writing."
>
> Code of Georgia, Section 3222, Sub-Division 5.

The statute of fraud, prior to the section above cited was:

> "No parol lease of realty could be created for more than three years."

In our state the rule has been laid down as follows:

> "A parol lease of land for more than three years is void by the statutes of fraud, and has the force and effect of an estate at will, which for some purpose has been by judicial construction converted int oan estate from year to year."

So, a loan of real estate for an indefinite period at the will of the lendor and of an indeterminate duration, which were the ancient terms, and denominated tenancies at will are now considered as from year to year.

> "A lease-hold interest for an indefinite period and uncertain term ,is an estate at will."
>
> 24th Cyc. 1038.
>
> Contracts creating the relation of landlord and tenant and for any time not exceeding one year, may be in parol, and if made for a greater time shall have the effect of a tenancy at will."
>
> Code of Georgia, Section 3693.

So, under the above authorities, if the land was loaned to M. C. Coleman, the bankrupt, as contended by his father, the appellee, his tenancy would be from year to year. Therefore, when he undertook to rent this land in parol to Dan

Davis for a period of five years, taking as evidence therefore rent notes of Dan Davis, he exceeded all right and authority held by him under this loan from his father, and Dan Davis would atone to M. C. Coleman, the bankrupt, as long as M. C. Coleman's tenancy existed and no longer, but when M. C. Coleman terminated this loan by surrendering possession of this property to its owner, the person who loaned it to him, E. J. Coleman, then the right of Dan Davis ceased and no rent could be collected from him, and no right to occupy the property was in him, and if M. C. Coleman had not sent these notes to his father, the owner of this land, but had placed them in the hands of his trustee, upon the decision of the question as to who held title to the real estate, the rent of which the notes represented, belonged, who owned the property, these notes could not be collected by the trustee. And this of itself shows that there is no claim of a transfer or conveyance by M. C. Coleman to E. J. Coleman, but the claim of E. J. Coleman rests upon his deed and the fact that he never gave the property to his son, but only loaned it to him, and therefore, the only question in this case is title or no title. And the District Court had no jurisdiction over this matter. If E. J. Coleman owned the real estate he could put Dan Davis off, he need not recognize him as a tenant, and Dan Davis would have no redress except upon the bankrupt, M. C. Coleman, for damages, he never having traded with E. J. Coleman, the owner of the land, and therefore the land belonging to E. J. Coleman, the notes representing the rent of the land, belonged to E. J. Coleman, and E. J. Coleman had a right to ratify this rental made by his son, though made without authority, and upon a ratification he would have a right to collect these notes, all of which revolves around the one question, **in whom rests the legal title t othis land?**

The attorneys for the appellants argues that this possession, by the delivery of notes, was a transfer. But this can not be the law, because if the land in dispute was owned by E. J. Coleman, then these notes, if he was willing to accept Dan Davis as a tenant, became his property, because they represented an agreement to pay for the use of property belong-

ing to E. J. Coleman, and thereby he became entitled to these notes, as he would be entitled to notes representing the rents of his property. In an effort to make the above statement clear we reason:

Suppose M. C. Coleman had delivered this land to his father, the owner, and had delivered the notets of Davis to his trustee as his property, is it not true that under the facts in this case, if the property was decided to be E. J. Coleman's propery that the trustee could not collect the notes so delivered as the property of M. C. Coleman? Do not the notes go with the land, and no delivery of the notes could be called a transfer, because it could not be enforced. The only way E. J. Coleman could collect the notes of Dan Davis is because he ratified the act of his tenant at will, and took the face of these notes as the rental of this land. We do not believe that he could foreclose under the law one of these notes. Davis' defense would be that this note is void and you can only collect a reasonable rent by virtue of my occupancy of the land after you went back into possession, unless Davis was willing to ratify and take E. J. Coleman as his landlord and pay the notes as if originally signed to E. J. Coleman. Ratification and substitution would make them collectible by E. J. Coleman, thats all.

While all Federal Judiciary has its origin in the Constitution, it is a well settled fact that the courts of the United States, inferior o the Supreme Court of the United States, possess no jurisdiction other than that expressly conferred upon them by the acts of Congress. Being statutory courts, they can possess no jurisdiction except such as the statutes confer.

Sewing Machine Companies, 18 Fallace, 553-577; 21 Law. Ed. 914.

Holmes vs. Golsmith, 147 U. S. 150, 37 Law. E. 118.

Courts exercising special statutory jurisdiction can not under any special analogy to proceedings in chancery exercise any power beyond that which the act or acts of congress have given.

United States vs. Knight, 1 Black, 488-89, 17 Law Ed. 80.

East Tennessee R. R. vs. So. Tel. Co., 112 U S. 306, 28 Law. Ed. 746.

The District Court of the United States gets its jurisdiction from the Acts of Congress passed within the power of the constitution. They are created by Acts of Congress, and it is necessary in every attempt to define their power to look to that source as a means of accomplishing that end.

18 Wallace, 553 Supra.

So, this suit was predicated under certain sections of the Bankrupt Act giving the District Court jurisdiction therein specified. Just here we might refer to the fact that in reference to the rent on the fifty acres of land, nothing in regard to it was set out in the pleading, but it incidently dropped out in the evidence, hence the decree of the court in reference thereto. The amount of this rent was agreed upon and paid.

Appellant on page 23 of his brief asks:

> "—If the Court deemed the transfer of the rent notes, as to this 50-acre tract void, and deemed that the Court had jurisdiction to require E. J. Coleman to pay the pro rata rents of the 50-acre tract, why did not jurisdiction of the Court exist to set aside the transfer of the rents of the locus in quo, as both rents were transferred by the very act, uno ictu, in delivering the rent notes to E. J. Coleman."

We can not conceive that counsel mean that where a suit in equity is filed and an answer had, and that during the trial it appears that there is a very small amount involved not in dispute between the parties, that the court, being limited by the Act of Congress, had no jurisdiction because of incidental occurances brought out in the testimony, of a small amount due, admitted by the defendant. In addition to that, we call the courts' atteitnon to the opinion of the Judge, and that part of his opinion, commencing on page 55 of the printed record, which is as follows:

"With respect to the rent notes, this feature, not disclosed by the pleadings, appears in the evidence. The notes were given for a body of land, which included a small tract fo 50 acres, which belonged to the bankrupt. This 50 acre tract went into the possession of the trustee, and there is no contest over its ownership. The defendant makes no claim to so much of the rent notes as equitably represents the rents of the 50 acre tract, and offers to account for same. Under the special facts of the case, I think that upon the defendant's accounting for the rent of the 50 acre tract, the action should be dismissed without prejudice to the right of the trustee to institute a suit in the State Court to recover the land and mesne profits. According, if the trustee and the defendant can agree on the amount, upon the payment of the same, the action will be dismissed in this court without prejudice. If the payment be not made, then so much of the action as relates to the recovery of the notes be retained, so as to permit a recovery of the amount of rent of the 50 acre tract. Let an order be prepared to this effect."

Now the parties agreed, and the defendant did not object to paying the amount due for the rent of the 50 acre tract of land included in one of the rent notes; the trustee did take possession of the 50 acre tract, selling it to E. J. Coleman, the appellee, so when it appered the there was rent due of this land, E. J. Coleman expressed the wish that he be allowed to pay this amount of money and he had offered to pay it without litigation. The opinion of the court is not the subject of review, and we can not believe that counsel is really in earnest, because this amount was settled by agreement before the court, and the final decree was rendered without prejudice to either party. There is no law that we can find, that makes the opinion of the Judge the subject-matter of review. The final decree of the court is the subject matter of review, and if the appellant had any objection to the final decree of the court, because the court allowed this amount to be settled, he should have made that objection to the court. In other words, the Court could not have passed on the land, and would not have done so, and did not do so, claimed by the trustee, but the court

simply said he would retain the case to settle that particular amount, and let the final decree express what was done in the matter.

In order to get the settlement of the rent of the 50 acre tract counsel for the appellant received the amount agreed upon by the appellee that he would pay, and that matter went out of the case with the payment of this amount, and the court bases its final decree upon the question of jurisdiction, as the case made by the pleading, and as it appears from the evidence.

Johnson vs. Griffin, 80th Georgia Report, 555.

We call attention to the above case, and note at some length this decision, because we think it settles beyond a doubt the question raised in this case.

There are two kinds of gift under the law of Georgia, that is, gift with improvements, which require the filing of an equitable petition to decree title in the affiant, which possession is less than seven years, and the second is conclusive presumption of the gift which arises from seven years possession and payment of rent. The court in the above case says,

> "The court, as now constituted, think that under the language of this section, the law does not define the character of the gift, whether written or oral. It conclusively presumes a gift, a parol gift, or one in writing; the gift though in parol, if acted upon and asserted for seven years without the payment of rent, and without the claim of dominion by the father over the property—not over the paper title, but over the property, is effective, and the son's acknowledgement that the paper title is in his father will not prevent the statute from taking hold and competing the gift. The statute says that this exclusive possession without payment of rent for the space of seven years, shall create conclusive presumption of a gift and convey title to the child; it does not require any deed to convey it. The possession continued so long, under such circumstances, will convey title to the child. Until that term has elapsed, the gift is incomplete; it is re-

vocable, if it is in parol, but after the lapse of seven years, the title passes, under this statute, whether there has been a deed executed or not; and it is not at all inconsistent that there should be a parol gift perfected under the statute, and yet the father have the paper title. The effect would be simply that the paper title is defeated by the statutory title; that is all. And it does not follow, therefore, that the recogniion by Benj. F. Johnson of a paper itle in his father, either while the seven years were running or after they expired, would be anything derogatory to his claim by virtue of the gift. If he meant, in making this acknowledgement, that the gift was made, but it was in parol, and that he was standing upon the gift, it does not matter where the paper title was or where he acknowledged it was. It was perfectly consistent with the gift by parol for the paper title to have been retained by the father.

"These being our views, we think the court was at least justifiable in granting this new trial—more especially as, after looking into the charge, which is in the record in full, it does not appear that this view was presented to the jury. It ought to be presented upon a second trial of this case, and the jury ought to be called upon to determine, not merely whether there has been a recognition of paper title in the father, but whether that recognition meant that there was no gift. If it meant that—if that is the construction to be put upon it, that it was the faher's land really as well as on paper, there ought to be no recovery in this action; but if the meaning of the son's admission was that "it is my land by gift, and by what I have done under that gift, but my father has the paper title, and I would like to get that, so as to afford evidence that it is my land without going to the trouble to prove it every time my title is asserted"—if the admission meant this, they are consistent with his right under the gift, and with the effect of this statute, as we now construe it, in such a case."

The above case clearly demonstrates that in a case between father and son, where the son claims title by gift, and the father denies, that there is an issue of gift or no gift, title or no title, to be left for decision.

"Title which is good as against a bankrupt, and his creditors at the time the trustee's title accrued, does not pass to the trustee."

Thomas vs. Thaggert, 209 U. S. 385.

Zillerman vs. First National Bank, 216 U. S. 134.

Now the question in the case at bar is, did the son ever have title to this property that he or his creditors could recover against E. J. Coleman. That is the question of this case. There is no claim by E. J. Coleman, appellee, by any act of the bankrupt whatsoever. The real claim is, that the son obtained the title by an act of the appellee, E. J. Coleman, in allowing him to remain in possession of this land for more than seven years. And, if that were not denied by E. J. Coleman, the title to the property, and the ownership thereof, would be in the son, but E. J. Coleman, appellee, say, that the title or ownership in this property has never vested or been in the bankrupt, that it has alwys been his, there being no gift and no intention to give, all of which has been hereinabove discussed.

Now, in the case at bar, the title to this land and the ownership thereof, never could vest in the son, the bankrupt, M. C. Coleman, as long as he admitted that the title and ownership of this property was in his father; acknowledged his ownership, his dominion. The court in the cases above cited reversed the judgment of the court below, and in doing so uses this language; speaking of the statement of the son, they say:

"If it means that it was the father's land really as well as on paper, there ought to be no recovery in this case."

V.

Conclusion

Did M. C. Coleman, the bankrupt, ever own this property, is the question, and it can only be answered by deciding from the evidence whether or not the defendant, the appellee, E. J.Coleman, who contended that the possession of the son was as a loan and by permission, and that the son recognized his ownership and dominion all the time. A settlement of that question favorable to the son is the only way to say title ever vested in the son. If it did, he had the title years before the bankruptcy proceedings.

Is the title and ownership of this land in E. J. Coleman under his plea and the facts in this case? If it is, it has been in him since sometime before 1902. This question can not be answered without looking into the pleading, and the evidence in the case and deciding whether the bankrupt went into possession as a loan and whether the appellee exercised dominion over the same, acknowledged by the son, or whether or not the son disclaimed title, either one or all three. If the question should be decided in favor of the appellee, that it was a loan, he exercising dominion acknowledged by the son, or that the son disclaimed title, either one or all three, then the title and ownership of this property was always in the appellee as far as the bankrupt is concerned, and never has the bankrupt had any title or ownership thereof. Now, these questions can only be settled without the consent of the adverse claimant in a court in which the bankrupt could have brought suit had the bankruptcy not intervened.

Bankrupt Act, Section 23.

So the District Judge was right. He did not undertake to pass upon the merits of the case, or to settle the difference between the adverse claimant and the bankrupt represented by his trustee, because he had no jurisdiction to do so. Therefore, we contend that the judgment of the District Court should be affirmed, and if the trustee is in earnest relative to

the title and ownership of this property, and is not satisfied since he has heard the facts, then he is not without remedy, but should come to the form which the law says has jurisdiction t opass upon the issues, the court in which the bankrupt could have brought suit, being the County of Emanuel, State of Georgia, the residence of the appellee, E. J. Coleman, and in the County where the land is situated.

Respectfully submitted,

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FLANDERS, AS TRUSTEE OF COLEMAN, *v.* COLEMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 419. Argued April 14, 15, 1919.—Decided June 2, 1919.

In a suit by a trustee in bankruptcy to set aside preferences and transfers, the jurisdiction of the District Court depends upon the allegations of the bill and not on the proof in support of them; and, where the bill makes a substantial case within the jurisdiction, the court must determine the merits. P. 227.

Under the Bankruptcy Act, as amended in 1903 and 1910, the District Court has jurisdiction of a suit brought by the trustee against a third party without his consent, to set aside preferences, under § 60b, and transfers under §§ 67e and 70e. *Id.*

Whether an alleged surrender of real property and delivery of rent notes amounted to conveyances under the state law, *held* matters appertaining to the merits and not to be considered on direct appeal under § 238 of the Judicial Code. P. 229.

249 Fed. Rep. 757, reversed.

THE case is stated in the opinion.

Mr. Frederick T. Saussy, with whom *Mr. A. S. Bradley* was on the briefs, for appellant.

Mr. F. H. Saffold for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here (Judicial Code, § 238) solely upon a question of the jurisdiction of the District Court of the United States for the Southern District of Georgia to entertain the suit brought by R. A. Flanders, as Trustee in Bankruptcy of M. C. Coleman, against E. J. Coleman.

Omitting unnecessary parts, the bills avers: That the jurisdiction of the court is invoked under §§ 60b, 67e and 70e of the Bankruptcy Act, as amended. That in 1902 the said E. J. Coleman, the father of M. C. Coleman, owned a tract of land containing 377 acres in the State of Georgia, and placed his son, M. C. Coleman, the bankrupt, in possession thereof, expressing the intention to give the land to his son. M. C. Coleman cleared the land, moved on the same and lived thereon for a period of at least twelve years, and placed valuable improvements thereon. That M. C. Coleman rented as landlord said 377 acres to Dan Davis, rent notes of $1,000 each for the same being taken in the name of M. C. Coleman, payable on October 1st, 1914, 1915, 1916, 1917, 1918, respectively. That M. C. Coleman collected the note maturing October 1, 1914, and that he became insolvent on December 1, 1914, and ever since that date, up to the time petition was filed, was insolvent within the meaning and intent of the Bankruptcy Act. That while so insolvent, in January or February, 1915, M. C. Coleman turned over to E. J. Coleman four of said rent notes of the value of $4,000, with the intent to hinder, delay, and defraud his creditors. That if the conveyance of the said rent notes was not made with the purpose to hinder, delay and defraud creditors, the transfer had the effect to create a preference in favor of E. J. Coleman, in that when the same was made M. C. Coleman was insolvent, and the collection thereof would enable E. J. Coleman to obtain a greater percentage of any indebtedness claimed to be owing to him by M. C. Coleman, than any other of such creditors of M. C. Coleman, of the same class. That said transfer was within four months from the filing of the petition in bankruptcy, the bankrupt was insolvent, and the transfer operated as a preference, and E. J. Coleman at the time of receiving the same had reasonable cause to believe that the same would effect a preference. That M. C. Coleman, up to December 1,

1914, had a good title to the said 377 acres of land, although it does not appear that a deed had ever been delivered from E. J. Coleman to M. C. Coleman. That E. J. Coleman placed M. C. Coleman in possession of the said land with the intention to give it to him, and the latter held possession of it as his own, and made improvements on it of great value, and dealt with the land as his own for the purpose of obtaining credit, and from said long possession the title to the land became vested in M. C. Coleman. That at the time of the transfer of the rent notes to E. J. Coleman the legal title or right to the land was completely vested in M. C. Coleman as if he had obtained a deed from E. J. Coleman. The complaint adds a description of the improvements, a house, etc., adding, it is averred, $6,400 to the value of the premises. That M. C. Coleman, by agreeing with E. J. Coleman to relinquish his rights and title to the real estate and improvements, in the year 1915, did so with intent to hinder, delay and defraud his creditors. The petition prays that the transfer of the four rent notes be declared void as being made with the intent to hinder, delay and defraud the creditors of M. C. Coleman. That the transfer of the notes be declared to be a preference, should the court hold or find that there is any indebtedness owing to E. J. Coleman by M. C. Coleman. That the notes collected by E. J. Coleman be accounted for. That any of said notes which may not have been collected, be decreed to be surrendered to petitioner. That the 377 acres of land be declared to be the property of the petitioner as trustee in bankruptcy for the purpose of applying the same to the credit of the creditors of the bankrupt. That in the event that the court should hold that the complainant should not have and receive the relief prayed for because of any defect in complainant's claim of title, that he be declared as such trustee to have an equitable lien or charge on the said land, at least to the extent of the value of the improvements. That the said